BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER TAX DECISION NO. T-2356 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

JOHN L. QUILLEN
(Petitioner-Appellant)

PRECEDENT
TAX DECISION
No. P-T-405

FORMERLY
TAX DECISION
No. T-2356

Employer Account No.

DEPARTMENT OF EMPLOYMENT
(Respondent)

The petitioner has appealed from Referee's Decision No. S-T-655 which denied his petition for reassessment of two assessments which the Department of Employment made against him on April 6, 1962.

STATEMENT OF FACTS

For the past five years, the petitioner has been engaged in purchasing used tires in the Los Angeles and San Francisco areas and reselling them to tire recappers throughout the San Joaquin Valley. He has carried on this business from his home in Denair, assisted by his wife who takes care of various clerical details. At his home, the petitioner usually sorts over the tires that he purchased and arranges them in better groupings so that they will command a better price from his customers.

The petitioner and his wife have four sons. The eldest, Jess, is of full legal age and married. The central issue in this case involves the nature of the petitioner's working relationship with him. The second son, Sherman, has recently become of full legal age. He enters into this matter only because he filed a claim for benefits which raised the question of status. The other two sons, Wendell and Jerry, are minors, and are not involved in these proceedings.

At one time or another and in one way or another, all of the sons have helped the petitioner and his wife in carrying on this home-based activity which provides the family livelihood. Those still living at home and attending school help as needed without particular thought of remuneration, but the eldest son Jess, being a married man and having a separate home to maintain and family to support, has since his marriage worked with the petitioner at various times on a definite profit-sharing basis. During this period, Jess has also owned his own truck, which was used in the deals in which he participated with his father, as well as in similar deals which he made on his own and in which his father did not share.

The working arrangement between Jess and his father was informal and, as might be expected, its terms were not evidenced by any written agreement and must be deduced largely from the conduct of the parties. In a typical deal in which they worked together, Jess and his father would each take his respective truck and go out and buy up a load of about 350 to 400 casings in his own name and with his own funds. They would pool their loads, sort them over, sell the pool and divide the profits equally between them.

Each party had his own bank account. No joint or common bank account was maintained. Each party would get receipts for what he bought and what he sold and for his gasoline and other ordinary expenses, and from these the petitioner's wife would figure out their accountings with each other.

The parties did not file a partnership income tax return. Each individually reports his share of business receipts and expenses on his own return. The returns were prepared by a Mrs. Hayes from the receipt slips which the parties kept.

Jess engaged in similar deals on his own along with those that he engaged in with his father. In both situations he exercised independent judgment in sorting over and selecting the casings he bought. In the deals in which they worked together each, while acting separately, felt that he represented the other.

The working relationship between Jess and his father came to an end in September of 1961 when Jess went to work as a carpenter in another community to which he moved. The petitioner contends that the relationship while it existed was that of partners. The issue presented is whether there was an employment relationship between the petitioner and his son, Jess.

REASONS FOR DECISION

We agree with the conclusion of the referee that the petitioner has not shown that a partnership arrangement existed between himself and his eldest son, Jess, during the period in question. This, however, does not rule out the possibility that the similar but less formal relationship of joint adventurers may have existed between them. The existence of a joint venture is equally as forceful as a partnership in excluding the simultaneous existence of an employment relationship between the same people with respect to the same transactions. Larson v. Lewis-Simas-Jones Co. (1938), 29 Cal. App. 2d 83 at page 87, 84 P. 2d 296 at page 299; Wiltsee v. California Employment Commission (1945), 69 Cal. App. 2d 120 at page 127, 158 P. 2d 612 at page 616; Bunn v. Lucas, Pino & Lucas (1959), 172 Cal. App. 2d 450 at page 465, 342 P. 2d 508 at page 517.

A joint venture is an undertaking by two or more persons jointly to carry out a single enterprise for profit. Nelson v. Abraham (1947), 29 Cal. 2d 745 at page 749, 177 P. 2d 931 at page 933; Goldberg v. Paramount Oil Company (1956), 143 Cal. App. 2d 215 at page 219, 300 P. 2d 329 at page 332; Nels E. Nelson, Inc. v. Tarman (1958), 163 Cal. App. 2d 714 at page 724, 329 P. 2d 953 at page 958. It is a consensual relationship originating in the voluntary agreement of the parties. Bunn v. Lucas, Pino & Lucas (1959), supra, 172 Cal. App. 2d 450 at page 461, 342 P. 2d 508 at page 515. Its existence depends upon the intention of the parties. James v. Herbert (1957), 149 Cal. App. 2d 741 at page 748, 309 P. 2d 91 at page 95.

Little formality is required in the creation of a joint venture. Lasry v. Lederman (1957), 147 Cal. App. 2d 480 at page 487, 305 P. 2d 663 at page 665. While it may arise out of an express agreement, either written or parol, in an appropriate situation its existence may be inferred merely from the acts and conduct of the parties. Nelson v. Abraham (1947), supra, 29 Cal. 2d 745 at page 749, 177 P. 2d 931 at page 933. There are times when

the acts and conduct of the parties even speak above their expressed declarations to the contrary. Universal Sales Corporation v. California Press Manufacturing Company (1942), 20 Cal. 2d. 751 at page 765, 128 P. 2d 665 at page 673.

It has frequently been said that the elements which distinguish a joint venture are:

(a) a community of interest in the subject of the undertaking;

(b) a sharing in profits and losses;

(c) an "equal right" or "a right in some measure" to direct and control the conduct of each other and of the enterprise; and

(d) a fiduciary relation between or among the parties.

Larson v. Lewis-Simas-Jones Co. (1938), supra, 29 Cal. App. 2d 83 at page 89, 84 P. 2d 296 at page 300; Stilwell v. Trutanich (1960), 178 Cal. App. 2d 614 at page 618, 3 Cal. Rptr. 285 at page 288.

By a community of interest, it is meant that there is a certain identity or mixture of interest in the venture wherein each and all of the parties to it are reciprocally concerned, and from which each and all of them derive a material benefit and sustain a mutual responsibility. Carboneau v. Peterson (1939), 1 Wash. 2d 347 at pages 375 and 376, 95 P. 2d 1043 at page 1055. This does not imply, however, that they must jointly own the property which forms the capital of the venture. Brown v. Fairbanks (1953), 121 Cal. App. 2d 432 at page 441, 263 P. 2d 355 at page 360. Many joint ventures exist, for instance, in which one party contributes money, another property, and a third skill, to the enterprise. Oakley v. Rosen (1946), 176 Cal. App. 2d 310 at pages 313 and 314, 173 P. 2d 55 at page 57; James v. Herbert (1957), supra, 149 Cal. App. 2d 741 at page 748, 309 P. 2d 91 at page 95.

The important thing is that the parties are in a reciprocal position with respect to interest and obligation. One party is not free to oust another from the enterprise, nor to leave it without obligation to the others. Sime v. Malouf (1949), 95 Cal. App. 2d 82 at

page 97, 212 P. 2d 946 at page 955. The usual right of an employer to discharge and of an employee to quit are not present in a joint venture. Larson v. Lewis-Simas-Jones Co. (1938), supra, 29 Cal. App. 2d 83 at page 89, 84 P. 2d 296 at page 300; Bunn v. Lucas, Pino & Lucas (1959), supra, 172 Cal. App. 2d 450 at page 463, 342 P. 2d 508 at page 516.

A joint venturer must have a right in some measure to direct and control the conduct of the enterprise. In the absence of special agreement, this implies an equal right with the other joint venturers to do so, but there can be joint ventures in which by agreement the parties have unequal control of operations. Even then the right is still mutual and reciprocal, and in these respects it differs from the complete and authoritative right of control which characterizes the relationship of an employer with his employee. (Stilwell v. Trutanich (1960), supra, 178 Cal. App. 2d 614 at page 619, 3 Cal. Rptr. 285 at page 289.

A joint venture involves the sharing of profits and losses. Usually this is an equal sharing, but there may still be a sufficient sharing to establish a joint venture relationship where the parties agree to an unequal distribution. Ford & McNamara, Inc. v. Wilson (1931), 119 Cal. App. 475 at page 480, 6 P. 2d 996 at page 998. As between themselves, the parties may agree that only certain of them shall share in losses. Campagna v. Market Street Railway Company (1944), 24 Cal. 2d 304 at page 308, 149 P. 2d 281 at page 283; James v. Herbert (1957), supra, 149 Cal. App. 2d 741 at page 748, 309 P. 2d 91 at page 95.

An employee also may be remunerated by a share of the profits of an enterprise, so the mere fact of profit sharing, in and of itself, does not serve to distinguish the two relationships. Nels E. Nelson, Inc. v. Tarman (1958), supra, 163 Cal. App. 2d 714 at page 726, 329 P. 2d 953 at page 958. But an employee is not a bearer of the risk of losses. Joint venturers bear losses in the absence of agreement in proportion to their share of the profits. Wiltsee v. California Employment Commission (1945), supra, 69 Cal. 2d 120 at pages 127 and 128, 158 P. 2d 612 at page 616.

The relationship between joint venturers is a fiduciary one. It involves mutual duties of disclosure and of sharing of advantages which are not characteristic

of an employment relationship. Milton Kaufman, Inc. v. Superior Court (1949), 94 Cal. App. 2d 8 at page 17, 210 P. 2d 88 at page 94. Employees owe distinctly different obligations to their employers from those which their employers owe to them.

These principles then serve to distinguish a joint venturer from an employee, and suggest inquiry into the following aspects of the working relationship:

(1) Did the workman have an interest in the enterprise of such a nature as to give him the status of a principal, and to place him in a position in connection with it from which he could not legally be ousted or discharged?

(2) Was any control over the details of the work to which the workman submitted, a joint and shared control in which he also had some right to participate, or a unilateral control, the right to which was vested solely in another or others?

(3) Did the workman share in the net profits of the enterprise and have a responsibility also to share in the misfortune of losses, or was his share in profits measured on some gross basis more characteristically associated with the remuneration of a profit-sharing employee?

(4) Were the obligations of the workman to others conducting the enterprise, mutual and reciprocal, or separate and unique in respect to his status?

The answers to these questions, of course, do not necessarily determine the relationship, but the attempt to answer them is likely to enable us to see the picture of it more clearly.

In the particular matter before us, we also have a rather unusual situation, in that it involves a working relationship between two individuals who are otherwise closely related to each other. The bonds of kinship coupled with attendant understanding and trust can enable such individuals to work together without the necessity of the more explicit delineation of many details of their

working relationship that might be expected in the case of strangers, and without the same implications that would ordinarily arise out of the absence of such delineation.

In addition, it can sometimes become difficult in such a situation to distinguish patterns of behavior natural to the family relationship from those which have a significant bearing on the working relationship. There are, for instance, certain elements of leadership and influence naturally inherent in the senior family position of a father, and of respect and confidence naturally inherent in the junior family position of a son which can easily produce behavior that might be mistakenly interpreted as being expressive of an employer's right of control in the one or submission to such by the other. The special circumstance of close family relationship clearly has a very important bearing upon the picture of the working relationship which emerges here.

Accordingly, we consider it significant to note particularly that while engaged in this working relationship, the petitioner's son, Jess, was a married man maintaining his own separate home and supporting his own family. He made a portion of his living by engaging in similar activities which he carried on independently of the petitioner. In this respect, his situation was markedly different from that of the petitioner's other sons who were still unmarried and living with the petitioner as members of his household.

The tenor of the working relationship between Jess and his father appears to us to have been one in which they worked together in pursuit of mutual gain. Each exercised a certain measure of control over the work as it progressed, and in so doing, each felt that he represented the other as well as himself. In commingling the various loads of tires which they collected, and in sorting the combined lot into groups for the purpose of more advantageous disposition to customers, they acted in a way that does not imply that either had a right to oust the other from further participation in the deal, or expected the other to leave it.

Jess and his father each accounted to the other for their various costs and expenses in arriving at their measure of profits. Their sharing was equal and in the net profit that remained after the deduction of their expense items. We see no reason to infer that under their method of accounting to each other, Jess would not also be chargeable with his share of any losses that might occur.

Remembering that it was only with respect to certain dealings that the petitioner and Jess so pooled their interests and worked together, we are of the opinion that the petitioner has not established a business relationship between them of sufficient formality and continuity to be characterized as a partnership. Rather it appears to us that they associated together in a way that individuals frequently do for a particular transaction, or series of them, for the limited purpose of the venture. Each had other business interests of a similar nature in which the other was not associated and did not share.

In the deals in which they did share, the petitioner and Jess clearly had the necessary community of interest. They shared equally in net returns, and there was a sufficient sharing of responsibility and control to be consistent with the picture of joint undertaking. We, therefore, find that the working relationship which existed between the petitioner and Jess, with respect to the transactions in question, was that of joint venturers, which finding automatically precludes the existence of an employment relationship between them.

We have previously mentioned that the petitioner has three other sons, one of whom, Sherman, is now of full legal age. It was Sherman's claim for benefits that raised the question of the status of Jess. We deem it appropriate here to explicitly state that we make no finding with respect to the status of Sherman, because his working relationship with the petitioner is not in issue in this proceeding.

DECISION

The decision of the referee is reversed. The petition for reassessment is granted.

Sacramento, California, June 28, 1963.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Tax Decision No. T-2356 is hereby designated as Precedent Decision No. P-T-405.

Sacramento, California, March 13, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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